# The Ministry of Justice, the discovery of truth through cross-examination, and the composition of the judiciary

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## The Ministry of Justice

Over the summer you might have seen *Harry Potter and the Order of the Phoenix*, or read the final adventure, and have pondered the work of the Ministry of Magic. You might also have followed the development of the government's new Ministry of Justice. They are, though, very different Ministries. One is fraught with the dark and sinister arts of intrigue and chicanery, and the other is an adventure about a young wizard.

### *The change from Department for Constitutional Affairs to Ministry of Justice*

Matters of law used to be divided between two government departments. The Home Office looked after prisons, and the sprawling criminal justice system, while the Department for Constitutional Affairs looked after the courts, including the criminal courts, tribunals, the judiciary, and legal aid.

Then, summarily, following no parliamentary debate or consultation period, from 9th May, 2007, a new Ministry of Justice was created out of the blue as if by a wave of a magic political wand. The new Ministry of Justice both replaces the Department for Constitutional Affairs *and* takes up some of the former responsibilities of the Home Office. We also have a newly defined Home Office which has gained more responsibilities in the area of counter-terrorism and security.

So, now we have a Home Office responsible for policing, immigration, asylum, security and counter-terrorism, and a Ministry of Justice responsible for judges, the courts, prisons, the probation service and legal aid.

### *Is the Ministry of Justice a new idea?*

In June 2007, Jack Straw MP became the first new appointment to the role of Secretary of State for Justice, and Lord Chancellor. The Ministry of Justice was created earlier (in May) but the then Lord Chancellor and Secretary of State for Constitutional Affairs (Lord Falconer) assumed the new role by virtue of being the incumbent Lord Chancellor.

The Ministry of Justice is not a new idea. In fact, it is an old idea. It is 184 years old. The jurist Jeremy Bentham advanced it in 1823 in a draft constitutional code.

It was periodically discussed as a proposal during the nineteenth century. In 1850, *The Times* published a list of what the duties of a new Minister of Justice might involve, including to ensure the legal system did not cause a denial of justice through "excessive arrears" (i.e. a backlog of unheard cases) and to frame annual reports on the state of civil and criminal justice. In 1859, when France was probably the best known example of a country with a Ministry of Justice, the English journal *The Jurist* said, rather haughtily, that such a Ministry was not a good idea because it would be borrowing an institution "from a country which we do not think Englishmen will better themselves by imitating." It said a Ministry of Justice would expose the bench to degradation by being supervised by non-lawyers.

In 1917, Lord Haldane was appointed to chair a review of the machinery of government. As a branch of activity controlled to some extent by governmental apparatus, law had developed very haphazardly. Legal people, places, and procedures were distributed among governmental departments and senior legal figures in a rather unsystematic way.

The Home Office was founded in March 1782 as the "Home Department", and by the 20th century the Home Secretary came to have exclusive responsibility for criminal process and penal institutions, while the Lord Chancellor (in the Lord Chancellor's Department, founded in 1880) was responsible for the courts and for the appointment of judges and Justices of the Peace (JPs). The Attorney General had limited control over the Bar, and the Master of the Rolls was responsible for solicitors.

So, in 1918 Haldane recommended a Ministry of Justice. Under that model, the Lord Chancellor would just be a judge and adviser to government, while all legal administration would be under the jurisdiction of the new Minister of Justice. The thinking was that Health, Education, and Trade became large departments of state after Victorian times, so why not justice?

The Haldane proposals were warmly supported by the Law Society but rejected by the Bar Council. The Bar did not want judges appointed by a minister. Barristers were also frightened in case the Minister for Justice sent representatives to watch the courts and report on their defects. They might even report on the judges! The proposals were dropped.

### *Why did the government create a Ministry of Justice?*

The former Prime Minister, Tony Blair, said in his written statement to Parliament, (29th March, 2007) announcing these changes, that the departmental redesign (the creation of a Ministry of Justice and the new responsibilities of the Home Office) was being done as part of the government's response to security, public protection, and criminal justice system issues.

Not long before John Reid announced that he would be retiring from office as Home Secretary, he said the reason for the change to the configuration of government apparatus was "the challenges of today's world and the priorities of today's people" (*The Times*, 30th March, 2007). It is not clear how Dr Reid perceived and evaluated the priorities of "today's people" if their representatives in Parliament were not offered the courtesy of a consultative discussion before the changes were announced.

### *Is the departmental change a good idea?*

Law is as extensive a part of modern society as health or education, and so clearly deserves departmental separateness. The division of responsibilities between the Ministry of Justice and the Home Office might have been better organised, though, had there

been consultation with the judiciary, the legal professions, Members of Parliament, and other interested parties.

Another question concerns the name of the new department. In 1920, Lord Justice Scrutton mentioned an incident in which a judge had told a London taxi driver to take him to "the courts of justice". "Where's that?" the cabbie asked. "The law courts", said the judge. "Oh, I know" said the driver "but it ain't the same thing". It is true that justice and law are not the same territory. The word "justice" conjures all sorts of ideas including aspects of morality, economics, and social policy. Law courts are usually loathe to use such criteria in the legal resolution of disputes – in a democracy all the courts are rightly required to do is apply the existing law, whatever that is. So, "Ministry of Justice" gives the department a dystopic Orwellian feel (compare the 'Ministry of Truth' in Nineteen Eighty-Four). In a pluralistic society we have many diverse concepts of justice but are required to share the same law. A better title for the new ministry, as it would not suggest some over-arching moral justice according to one doctrine or faith is being used, might have been "The Ministry of Legal Justice".

### *Conflicts of interest within the Ministry of Justice*

There are major problems with the new arrangements. They create a conflict of interest at the heart of legal justice. The Secretary of State for Justice (also know as the Minister of Justice) is responsible for the courts and their budget. He is in some respects their *de facto* paymaster. But under the new Ministry of Justice umbrella, he is also responsible for prisons. That means that from his limited budget, money he spends on the courts he cannot spend on prisons, and money he spends on prisons he cannot spend on the courts. That is not a problem in itself in other circumstances where other ministers have similar choices to make between competing concerns as between, say, schools and colleges. But it is a problem where one of the two possible beneficiaries has power (as do the courts) to decide whether the minister is fulfilling his legal duties in respect of the other possible beneficiary.

Ministers sometimes end up in court if their department, for example, is being "judicially reviewed" (i.e. litigated against with the allegation that it has not acted in a lawful way). If that happened now to the Minister of Justice in relation to the way the prison service is run, it could put him and the courts in a very difficult position.

It is imaginable that there will be cases where this ministerial budget holder is, as Minister for Justice, a defendant in the law courts (whose budget he influences), and where the outcome of cases about, say, prisons, could affect how much funding the courts might enjoy in future from a limited Ministry of Justice budget. In a particular case, the legally proper outcome might require that the courts rule that the Minister go away and do something like change the way prisons are run in some respect (in order, for example, to comply with human rights law). But the consequence of diminishing the Minister's budget in that way would be to leave less money for the running of the courts. In requiring the Minister to do something which happens to cost a lot of money, the courts would be depriving *themselves* of money needed to fund the courts!

That is *not* to suggest that a law court *would*, to keep more of the Minister's budget for the courts, refrain from telling the Minister what the law requires him to do with prisons. But the point is that no law court should ever be compromised by an apparent conflict of interest. Moreover, under section 1 of the Courts Act 2003, the Minister for Justice is required to ensure that the courts operate in an "efficient and effective manner", so he could be left torn between reaching into his departmental barrel of money to fund what the courts have asked him to do to the prison service but, in doing, so depriving the courts of money for their running cost that he is bound to provide under the 2003 legislation.

The government has said it will get around this by establishing a statutorily protected courts' budget but it remains to be seen how well this will work in practice.

## The discovery of truth through cross-examination

Cross-examination is an important feature of criminal and civil trials. As was recognised in a recent Court of Appeal decision, an unwarranted restriction of an advocate's opportunity to cross-examine a witness can render a trial unfair under Article 6 of the European Convention on Human Rights, and therefore be a reason for ordering a re-trial: *R v John K* [2007] EWCA Crim 1339. The simple point of significance decided in this case in the context of the English legal system is the indispensable value of cross-examination.

In court, cross-examination is where an advocate questions a witness who is part of the other side of the case. The questions cross from one side's lawyer to the other side's witness.

The aim of the exercise is to weaken the opponent's case, and to help establish facts which are favourable to the side of the cross-examiner. It is an opportunity to expose any unreliability of an opposing witness's testimony. Cross examination can be done politely and without hostility. Sir John Mortimer QC notes (Clinging to the Wreckage, 1982, p. 106) that his late father (also a distinguished barrister) used to say "the art of cross-examination is not the art of examining crossly"

When a prosecuting advocate has finished questioning (called "examining") a witness called by the prosecution, defence counsel can cross-examine that witness. Later the prosecution has the same chance to discredit the evidence of defence witnesses. In a civil case, similarly, the claimant and the defendant (usually through advocates) can cross-examine each other, and each other's witnesses. The procedure has a long history. The noun "cross-examination" was first recorded in a case in 1729, although the technique itself is much older, appearing in one case involving a will in Norwich in about 1200. Cross-examination is an excellent method of clarifying the facts of a disputed matter. It is a serious intellectual contest fought in the threat of grave consequences. It is people at the peek of rational truth-finding.

The advocate has many advantages over the witness, like knowing the rules of evidence, and choosing the line of inquiry in cross-examination. But the advocate does not always get the upper hand. A barrister in Ireland once began a cross-examination of an Irish Prelate with the words: "Am I wrong in thinking you are the most influential man, and decidedly the most influential Prelate or Potentate, in the Province of Connaught?" The witness replied: "Well, you know, they say these things, but it is in the sense that they would say that you are the very light of the Bar of Ireland: these are children's compliments"

Cross examination can involve counsel taking a witness through a sequence of propositions he'll have to agree with until he's eventually cornered into agreeing with one final deadly point. But, equally, advocates sometimes pivot quickly to a riveting question. In opening the cross-examination of Frederick Seddon (who was on trial for the murder of his lodger Miss Eliza Barrow), Sir Rufus Isaacs, Attorney General, began thus:

ISAACS: Miss Barrow lived with you from July 26, 1910, to September 14, 1911?
SEDDON: Yes
ISAACS: Did you like her?

This flummoxed Seddon and he didn't regain his composure. He could see that if he said he had liked her he'd be asked why he'd put her in a pauper's grave, whereas if he said he hadn't liked her he'd tilt the case further against himself. Decidedly, a killer question. Seddon was eventually executed for the murder.

One masterful cross-examination was that in 1909 by Sir

Edward Carson KC (King's Counsel) of the witness William Cadbury, director of the chocolate company (see *The Art of the Advocate*, Richard Du Cann, 1964, chapter 7). Between 1901 and 1908, Cadburys obtained half their cocoa from islands off Angola which exploited forced slave labour. Cadburys, knew about the slavery, and profited hugely from it for years but didn't reveal it to the public. Instead, it traded on its reputation as a model employer, and the benevolent treatment of its workers at Bourneville in England. Meanwhile, people were snatched as slaves and forced to march up to a thousand miles to the plantations, and killed if they did not keep up. *The Evening Standard* published an article critical of Cadburys, and the firm sued saying it made them look like "a bunch of canting hypocrites". In a brilliant cross-examination lasting five hours, Carson dismantled the case of William Cadbury and the firm. The final exchange was a dramatic dénouement. After hours of quizzing about how much slave blood and suffering was involved in the production of the chocolate, and the complicity of Cadbury, there was this question:

> CARSON: Have you formed any estimate of the number of slaves who lost their lives in preparing your cocoa from 1901 to 1908?

That is a bit like asking "have you stopped beating your wife?" - a question which, answered either way, condemns the quizzed person. In answer to the question whether he'd quantified the suffering on which he had sold chocolate, the director replied meekly:

> CADBURY: No, no, no.

The jury found Cadburys had been libelled but awarded damages of one farthing.

Sir Henry Curtis-Bennett KC (1879-1936) was famous for maintaining that in cross-questioning an advocate should never ask a question if he didn't already know the answer. A modern case in point was recounted by Sir Oliver Popplewell (*Benchmark*, 2003, p. 130). As a young barrister defending a man charged with careless driving, Mr Popplewell was cross-examining a prosecution witness who had testified that the defendant had been speeding. The witness was repeatedly pressed to estimate the speed of the car but declined. Having satisfactorily established the witness's incompetence in car-speed estimation, Mr Popplewell didn't sit down but asked one final fatal question: "Why are you telling the court you cannot estimate the speed of my client's car?" The witness's response was calm and clear: "Because I have never seen a car go as fast as that in all my life!"

## The composition of the judiciary

According to research conducted for the Sutton Trust in 2007, 70 per cent of judges were privately educated and 78 per cent went to Oxford and Cambridge. Is that good or bad? Being a judge requires an exceptional mind, and it is not odd that clever people come from schools famous for educational success, and from world class universities.

The basic argument against privileged paths to judgeships is this. Law is shaped by judges, and affects everyone. So, who gets to do judging is important. As law is a very social enterprise, it is unfair if judges come from just a few leafy avenues in any given town. Biologically, brain capacity is not post code linked. A multicultural society whose judges all have the same background can feed into the law only a relatively narrow splinter of experience. And privileged access to anything these days can be seen as unjust as people generally want the same rules to apply to everyone equally - in fact the word "privilege" comes from the Latin (*privilegium*) for "private law", a law applying to an individual.

The opinion that it does not matter who our judges are provided they are technically good at law was put in an acerbic way by Roderick Pitt Meagher, a New South Wales Court of Appeal judge. He countered the 'need for diversity' argument by asking, 'if 30 per cent of the community are cretins, then in all fairness should not 30 per cent of the judiciary be cretins?' That, of course, is a rather daft argument because there is nothing about being female, or black, or Asian that stops a person from becoming a good judge whereas a cretin, by definition, can't read and understand law books so society could not possibly have cretins as judges.

Judges make law (see *The English Legal System*, Slapper & Kelly, 8th ed, 2006, chapters 2 and 5), and what they have declared often reflects who they are. For example, consider the way the law developed to apply to women. For centuries, until 1992, it was not a crime for a man to rape a woman if she was his wife. The people who fabricated this rule and perpetuated it for centuries were all male judges many of whom regarded women as inferior humans.

Historically, judges made many chauvinistic rules such as one saying wives could not make contracts in the same way as their husbands, and one that said women were not legal "persons" entitled to become officials or lawyers. Judges proclaimed that although a man had a defence to murder if he killed another man whom he caught having sex with his wife, a woman did not have a defence if she killed her husband after catching him with another woman.

The judiciary is supposed to be a fountain of wisdom, so even prejudice spouted from judges will be heeded and has nourished social bigotries. Judges have said such things as "You do not specify a ground by giving what may be called the woman's reason and saying 'because I say so' " (Mr Justice Croom-Johnson, 1945), "It is well known that women in particular and small boys are liable to be untruthful and invent stories" (Judge Sutcliffe, 1976), and, to a woman witness who wanted to be addressed with the title 'Ms', "I've always thought there were only three kinds of women: wives, whores and mistresses, which are you?" (Mr Justice Harman, 1991).

Centuries of chauvinism from authoritative figures can affect the mind-set of ordinary people. In an American study of prejudice in 1968, Philip Goldberg gave 140 female undergraduates a set of articles. They all got identical articles signed by "J. T. McKay". Within the texts, though, half the articles named the author as John T. McKay, and the other half of the same articles as Joan T. McKay. The students rated the articles for things like persuasiveness and profundity. They rated the work with the name of John McKay much higher than that of Joan. (see: A Review of Sex Role Research, A R Hochschild, *The American Journal of Sociology*, Vol. 78, No. 4, Changing Women in a Changing Society (Jan., 1973), pp. 1011-1029. It is a sign of social progress that such prejudice would be less likely today.

The current British judiciary is not yet a fair reflection of the society it judges. Of the 639 Circuit Judges, only 73 are female, and of 108 High Curt judges only one is from an ethnic minority. The composition of the judiciary will change slowly, because judges' educational background lags about 30 years earlier than their appointment to the Bench. So, changes in access to legal education today will become manifest on the Bench about 2037.

In many ways prejudice is good because it helps us in everyday life and in survival. If someone strides towards you at night holding a knife, you are likely to flee with the sensible prejudice that the approach is not a proposed cutlery sale. But unjustified assumptions about who makes a good judge are on their way out. We have edged away from some old suppositions. In a treatise from about 1290, Andrew Horn, a chamberlain of London, listed as people ineligible to become judges: "women" and others equally ill-suited including "open lepers, idiots, attorneys, [and] lunatics..."